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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 455

MARIE ELIZABETH ELG,
PETITIONER,
vs.
FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

Petitioner, Marie Elizabeth Elg, a natural-born citizen of the United States, prays that a writ of certiorari issue to review the decree of the Court of

Appeals for the District of Columbia entered in the above entitled case on August 1, 1938 (R. 39).

Petitioner excepts to and seeks review of the decree only insofar as it affirms the decree of the District Court sustaining the motion to dismiss as to the defendant Cordell Hull and dismissing the bill of complaint as to the defendant Hull and thereby denying to the petitioner a declaratory decree as to defendant Hull that she is a natural-born citizen of the United States (R. 26).

Opinions Below.

The District Court opinion written by District Judge Jennings Bailey was filed November 1, 1937 (R. 25) and is not published in any of the official reports. The opinion of the Court of Appeals written by Chief Justice Groner was filed August 1, 1938 (R. 32-38) and is reported in ~~F. (2)~~ F. (2) ___.

Jurisdiction.

The decree of the District Court sustaining motion to dismiss the bill of complaint as to the defendant Hull and dismissing the bill of complaint as to defendant Hull, and overruling motion to dismiss the bill of complaint as to defendants Perkins and Shaughnessy and declaring the petitioner to be a natural-born citizen of the United States was filed November 18, 1937 (R. 26). The decree of the Court of Appeals affirming the decree of the District Court was filed August 1, 1938 (R. 39). Petitioner's mo-

tion for leave to file motion to amend decree was denied by the Court of Appeals October 19, 1938 (R. ~~42~~ 41.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The amount involved is impossible to state in figures, but is the great value to a natural-born citizen of the United States of the citizenship conferred by the Constitution, which this Court has said is of tangible worth and invokes the sympathy of this Court in the citizen's efforts to retain it. *MacKenzie vs. Hare*, 239 U. S. 299, 312.

Principal Questions.

In her bill of complaint as filed, the petitioner sought both a declaratory decree under the Federal Declaratory Judgments Act, as amended (28 U. S. C. A. 400, 49 Stat. 1027) to determine questions of jurisdiction and also injunctive relief. As either of these remedies is sufficient without the other, the Court having held that she should have a declaratory decree as against two of the defendants, she does not press her prayer for injunctive relief except as an alternative remedy if the declaratory decree should be ultimately denied. Therefore the principal questions now relate to the extent of the declaratory decree.

The underlying question in this case is whether a person who was born in the United States, and therefore who was at birth a natural-born citizen of the United States by virtue of Section 1 of the XIV

Amendment to the Constitution,* can be divested of such birth citizenship during her minority by the act of another or by operation of a foreign law.

As to defendants Perkins and Shaughnessy the Court below has answered this question in the negative and has declared the petitioner to be a natural-born citizen of the United States, but as to the defendant Hull has dismissed the bill for reasons given in the opinions (R. 25, 32-38), wherefore it may be contended that as to the Secretary of State the decree is not binding and this question is still undetermined.

The principal question sought to be raised by this petition, most concisely stated, is whether the erroneous administrative determination of the Secretary of State that he has no jurisdiction to issue an American passport to the petitioner because of his erroneous determination that petitioner is not a United States citizen, is immune from judicial review on the ground that if he had determined that the petitioner was a United States citizen, the issuance of a passport would still rest in his sound discretion, with which the Court will not interfere.

More specifically stated, the question is whether where the Secretary of State has erroneously determined that the petitioner, a natural-born citizen of the United States, has been divested of her citizenship and therefore that the Secretary of State has no

*Section 1 of the XIV Amendment to the Constitution provides:
"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside".

jurisdiction to issue an American passport to her, the petitioner is entitled to a judicial determination and declaration of her citizenship which shall be binding upon the Secretary of State and establish his jurisdiction in the matter; or whether because the Secretary of State has discretionary powers over the issuance of passports to American citizens, the petitioner shall be denied as to him a determination and declaration of the jurisdictional fact of her American citizenship.

Statement of Facts.

Briefly stated, the record shows the following facts; Petitioner, a natural-born citizen of the United States (R. 1; R. 8; *Ex. A;* R. 15, *Ex. H-1),* was born in Brooklyn, New York, October 2, 1907, of parents who had emigrated from Sweden and had become naturalized citizens of the United States prior to her birth, to wit, on September 24, 1906 (R. 8, *Ex. A; Exs. C & G* fol. R. 10 & 14; R. 15; *Ex. H-1;* R. 19, *Ex. H-3).*

In 1911, when petitioner was about four years of age, she was taken by her mother to Sweden, where she resided until she became twenty-one years of age (R. 2; *Exs. C & G,* fol. R. 10 & 14; R. 15, *Ex. H-1*).

On July 25, 1922 (defendants allege) petitioner's father went to Sweden and has not since returned to the United States (R. 15; *Ex. H-1;* R. 19, *Ex. H-3*). However, he retained his United States certificate of naturalization until at least November 13, 1934 when (defendants allege) he voluntarily surrendered it (R. 15-19, *Exs. H-1, H-2, H-3).* He committed no other act

of expatriation or of acquisition of a foreign citizenship and no action was ever brought against him to cancel his United States naturalization certificate.

In 1928, before petitioner attained majority, she made inquiries with a view to returning to the United States.

In 1929, within one year after attaining majority, upon her application setting forth all the foregoing facts then existent, the Secretary of State instructed the American Consul at Göteborg, Sweden to issue an American passport to petitioner, and in the same year she was admitted at the Port of New York as a natural-born United States citizen and has since continued to reside in the United States (R. 2; R. 9, 10 *Exs. B-1 & B-2; Ex. C* fol. R. 10; R. 3; R. 11, 12, *Exs. D & E*).

Petitioner has never committed any voluntary act of expatriation; she has never voluntarily become naturalized in any foreign country, nor taken nor subscribed to any oath of allegiance to any foreign country (R. 1); on the other hand, she has on several occasions taken and subscribed to the oath of allegiance to the United States (R. 2; *Exs. C & G*, fol. R. 10 & 14).

However, in April, 1934, petitioner was subjected to proceedings instituted by the Immigration Service in New York City, was told she was an alien, was induced to execute a sworn affidavit stating the foregoing facts which were made the basis of *ex parte* departmental inquiry and review at home and abroad (R. 3; R. 13, *Ex. F-1;* R. 15-19, *Exs. H-1, H-2 & H-3*). In April, 1935,

she was formally notified that she was an alien, illegally in the United States, ordered to leave this country, and threatened with deportation if she did not depart forthwith (R. 3; R. 13, *Ex. F-1*). Defendants Perkins and Shaughnessy from time to time postponed taking further steps toward her deportation, but have not countermanded their order and threats, which have only been stayed pending final determination of this case (R. 14, *Exs. F-2, F-3;* R. 21, 22).

In July, 1936, petitioner applied to the Secretary of State for an American passport upon an application (R. 4; *Ex. G,* fol. R. 14) in substance identical with her application of 1929 on which a passport had been issued to her. The defendant Hull refused to issue a passport to petitioner solely on the *jurisdictional* ground that he had administratively determined she was not a citizen of the United States and therefore he had no power or authority to issue a passport to her; he did not purport to pass upon the merits of her case nor did he deny her a passport in the exercise of his discretionary powers over the issuance of passports to American Citizens (R. 4, 5; R. 15, 16, *Ex. H-1;* R. 18, 19, *Exs. H-2 & H-3*).

Further efforts before both the Departments of Labor and of State to establish the fact that the petitioner was a United States citizen and therefore that the Secretary of Labor had no jurisdiction over her continued stay in the United States and that the Secretary of State did have jurisdiction to consider her application and authority in his discetion to issue to her an American passport, were of no avail (R. 14, *Exs. F-2 & F-3;* R. 18, 20, *Exs. H-2 & H-4*).

History of the Case.

Upon the foregoing state of facts, on January 14, 1937, the petitioner brought her suit in the United States District Court for the District of Columbia against Frances Perkins, Secretary of Labor, Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and Cordell Hull, Secretary of State, praying the Court (1) to issue a declaratory judgment that she is a citizen of the United States; (2) to enjoin defendants Perkins and Shaughnessy from further prosecuting deportation proceedings against her; (3) to enjoin the defendant Hull from impugning or denying her American citizenship and from refusing to issue her a passport solely on the ground that she is not such a citizen; (4) to enjoin defendants Perkins and Shaughnessy *pendente lite* from taking further action toward her deportation until final determination of this suit, and (5) other and proper relief (R. 1-6).

On January 26, 1937, rule to show cause why temporary injunction should not be issued was discharged without prejudice to the rights of the parties upon statement by defendants Perkins and Shaughnessy by their attorneys that no proceedings to enforce deportation of petitioner would be taken pending final outcome of this case (R. 20, 21).

On February 4, 1937, defendants Perkins, Shaughnessy and Hull filed a motion to dismiss the bill of complaint on the grounds that the plaintiff is not a citizen of the United States by virtue of the Laws of Sweden in conjunction with a protocol to a convention between the United States and Sweden and Norway

(34 Stat 1228)

and Section 2 of the Act of March 2, 1907* and for alleged defects in the pleadings (R. 23, 24).

The motion to dismiss was argued in the District Court before Mr. Justice Bailey who, on November 1, 1937, rendered the opinion of the Court that as to the defendant Hull the motion to dismiss should be sustained "for the reason that the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue"; that in other respects motion to dismiss should be overruled (but no injunctive relief was granted) (R. 25, 26).

In accordance with the opinion, on November 18, 1937, final decree was entered in the District Court sustaining the motion to dismiss as to defendant Hull and dismissing the bill of complaint as to defendant Hull, and overruling the motion to dismiss as to defendants Perkins and Shaughnessy and declaring the plaintiff to be a natural-born citizen of the United States (R. 26).

From the foregoing final decree both the petitioner and the defendants Perkins and Shaughnessy appealed on November 18, 1937 (R. 26, 27).

The appeal was argued, and on August 1, 1938, the Court of Appeals rendered its decision through the opinion of the Chief Justice, and in accordance there-

*Section 2 of the Citizenship Act of March 2, 1907 provides:
"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

with decree was entered on the same day affirming the decree of the District Court in all respects (R. 32-38, 39).

On October 15, 1938 petitioner filed motion for leave to file motion to amend decree so as to reverse decree of the District Court insofar as it dismissed the bill of complaint as to defendant Hull; this motion was denied on October 19, 1938 on the ground that the object sought by proposed motion is fully taken care of in original opinion (R. ~~42, 43~~. 41.)

The mandate has been stayed in the Court of Appeals and the defendants Perkins and Shaughnessy have stated they intended to file petitions for writ of certiorari. In order that all issues may be presented for review, the petitioner is filing this petition for writ of certiorari.

Errors To Be Urged.

The Court of Appeals erred in holding that as to the defendant Hull, Secretary of State, the motion to dismiss the petitioner's bill of complaint should be sustained and the bill of complaint dismissed as to the defendant Hull on the ground that the issuance of a passport involved discretion.

The Court of Appeals erred in affirming the decree of the District Court dismissing the petitioner's bill of complaint as to the defendant Hull on the ground that "the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue".

Apparently both the District Court and the Court of Appeals misconstrued the petitioner's bill of complaint as seeking to compel the Secretary of State to issue a passport to her. The petitioner recognizes that the issuance of a passport to an American citizen rests in the sound discretion of the Secretary of State and she does not seek by injunction, mandamus, declaratory judgment or other coercive measures to interfere with his discretionary powers in that respect. As set forth above in the Statement of Facts, the Secretary of State has not denied a passport to petitioner in the exercise of his discretion but solely on the grounds that as he has administratively determined she is not an American citizen he cannot issue her a passport as he lacks the jurisdiction to do so. The petitioner's prayer for a declaratory decree is for determination of her American citizenship, and establishment of the fact that the Secretary of State has jurisdiction to issue her a passport, although whether or not he will do so will then remain in his sound discretion. Her prayer for injunction (not pressed if a declaratory decree issues) is that the Secretary of State be enjoined from impugning her American citizenship and refusing to issue her a passport *solely on the ground that she is not such a citizen*. Both courts therefore erred in holding the bill should be dismissed as to the defendant Hull on the grounds stated.

Reasons for Granting the Writ.

The defendants Perkins and Shaughnessy have stated they intend to petition for writ of certiorari for review of the decree insofar as it affects them and if

their petition is granted the petitioner herein would be greatly prejudiced if this petition were not also granted and the entire case brought before this Honorable Court for review.

The case is of importance to the general public as it involves the inviolability of United States citizenship conferred at birth by the Constitution on all persons born, as was the petitioner, within the territory and under the jurisdiction of the United States and thus affects all citizens, of which there are many, in the class of the petitioner.

The questions raised by this petition are of importance to the general public as there are numerous persons in the class of the petitioner who are not threatened with deportation but are denied diplomatic protection, including protection of their property, if any, in foreign countries, and whose only recourse for a determination and declaration of American citizenship would lie in a bill for a declaratory judgment brought against the Secretary of State.

The decree below should be reviewed and clarified because, as entered, it is inconsistent in that it properly sustains the bill as to the defendants Perkins and Shaughnessy and as to them declares petitioner to be a natural-born citizen of the United States, but erroneously dismisses the bill as to the defendant Hull and as to him leaves her citizenship undetermined, unadjudicated and in doubt.

Dismissal of the bill of complaint as to the defendant Hull, permitting him to stand on his erroneous de-

termination that petitioner is not an American citizen and to continue to deny her protection to which every American citizen is entitled and to invade and interfere with her rights and immunities as an American citizen constitutes a denial of the due process of law guaranteed by the V Amendment to the Constitution.*

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the District of Columbia directing that the record and proceedings in the above entitled case be certified to this Honorable Court for review; and that the decree of the Court of Appeals be amended so that the decree of the District Court shall be reversed insofar as it dismisses the bill of complaint as to the defendant Hull and as so modified to include the defendant Hull the decree declaring the Petitioner to be a natural-born citizen of the United States shall be affirmed.

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*The due process clause of the V Amendment to the Constitution provides:
"No person shall be * * * deprived of life, liberty, or property, without due process of law;"